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MISC Bhd v Cockett Marine Oil (Asia) Pte Ltd

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HIGH COURT (KUALA LUMPUR) — ADMIRALTY IN PERSONAM NO WA-27NCC-46–05 OF 2020
ATAN MUSTAFFA JC
7 APRIL 2021

C

Arbitration — Stay of proceedings — Application — Whether defendant entitled to stay of proceedings pending arbitration — Whether there was arbitration agreement between plaintiff and defendant — Whether defendant had taken a step in the proceedings — Whether stay should be granted — Arbitration Act 2005 s 10

D

Civil Procedure — Injunction — Arbitration — Plaintiff applied for anti-arbitration injunction to restrain defendant from taking further steps in arbitration proceedings — Whether plaintiff entitled to anti-arbitration injunction — Whether there were serious issues to be tried in respect of plaintiff's claim — Whether damages was an adequate remedy — Whether balance of convenience lay with plaintiff — Whether there was full and frank disclosure by plaintiff

E

F

Contract — Contractual terms — Entire agreement clause — Whether supply contract provided for arbitration in London — Whether entire agreement clause was operative — Whether defendant demonstrated existence of arbitration agreement — Arbitration Act 2005 s 10

G

This was the defendant's application in for stay of proceedings pending arbitration in London ('encl 16'), and the plaintiff's application for an anti-arbitration injunction to restrain the defendant from taking further steps in the arbitration proceedings in London ('encl 22'). This arose from a dispute arising from an alleged breach by the defendant under a bunker supply contract between the plaintiff as buyer and the defendant as seller. The defendant was the owner of a vessel and the plaintiff was a bunker supplier incorporated in Singapore. On 28 August 2018, the plaintiff invited the defendant and a number of other bunker suppliers to tender for the supply of bunkers for delivery by barge to the vessel on 10 September 2018. A series of emails were exchanged between the plaintiff and defendant's officers on 28 August 2018 leading to the tender being awarded to the defendant. On 12 September 2018, the parties made the necessary arrangements to perform the contract to supply bunkers to the plaintiff by the defendant ('the supply contract') and the first

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parcel of 2,000 metric ton of bunkers were supplied by the defendant to the plaintiff's vessel pursuant to the supply contract. On the same day, the vessel was detained by the Malaysian Maritime Enforcement Agency ('MMEA') for potential offences under the Malaysian Customs Act 1967 in relation to that parcel. The vessel's tank was sealed and the plaintiff was ordered not to use the bunkers pending the completion of an investigation. Subsequently, the plaintiff terminated the supply contract on the grounds that the defendant was in breach of its obligation to deliver the bunkers free of claims and encumbrances. By agreement of the parties, the contract for the other parcel of 2,000 metric tons was cancelled. The plaintiff solicitor then sent a letter of demand to the defendant claiming damages arising from the defendant's breach of contract. At a meeting following the release by the MMEA of the detained bunkers, the parties agreed that the plaintiff would buy them at the agreed price of USD718. That agreement was recorded in a letter from the plaintiff dated 19 December 2018. The defendant's solicitors issued a letter to the plaintiff's solicitors stating that they were taking their client's instructions and would revert when they had done so. The defendant's solicitor then wrote on 13 January 2020 denying that the detention of the vessel flowed from the defendant's negligence or breach of contract. On 30 January 2020, the plaintiff wrote again stating that the defendant was in breach of cll 9.1 and 11.1 of the plaintiff's terms and saying that if payment was not made within two weeks, proceedings would be commenced without notice. On 28 May 2020, the plaintiff commenced proceedings against the defendant. On 14 August 2020, the defendant commenced arbitration in England. A notice of commencement of arbitration proceedings was issued by the defendant's solicitor in London, Messrs Preston Turnbull LLP, to the plaintiff citing cll 21.1 and 21.2 of the defendant terms. At a case management, the defendant's solicitors informed the senior assistant registrar that it had filed a notice of application to stay the court proceeding under s 10 of the Arbitration Act 2005 and was proposing to serve it on the plaintiff. The defendant's solicitor said that the defendant did not file a defence because it was challenging the jurisdiction of the Malaysian High Court. In response, the senior assistant registrar said that according to the court's minutes, the defendant had applied for an extension of time of two weeks to file the defence and the court had ordered it do so before 18 August 2020. A further case management took place at which the plaintiff's counsel had informed that the defendant's counsel and the court that it was applying for an anti-arbitration injunction. The defendant took out an ex parte injunction against the plaintiff in the UK High Court, injuncting the plaintiff from proceeding with Malaysian proceedings and encl 22 in particular. The ex parte injunction was set aside at the inter partes hearing. The issues which arose for determination of the court were: (a) whether the defendant had demonstrated the existence of an arbitration agreement between the parties and that it had not taken a step in the court proceedings; and (b) whether the anti-arbitration injunction should be granted.

Held, dismissing the defendant's application ('encl 16') and allowing the plaintiff's application ('encl 22') with costs:

(1) The supply contract was on the plaintiff's terms which provided for Malaysian law and jurisdiction and not on the defendant's terms which provided, inter alia, for arbitration in London. Looking at the correspondence as a whole, the parties contracted on the plaintiff's terms so that, by virtue of cl 13.1 of the plaintiff's terms, the supply contract was subject to Malaysian law and the exclusive jurisdiction of the Malaysian court. The supply contract was concluded on 28 August 2018 on the plaintiff's terms. Clause 14.2 of the plaintiff's terms, which was an 'entire agreement' clause which superseded all prior negotiations, representations or agreements, oral or written was operative. The supply contract was not made after 28 August 2018 and accepted by conduct as submitted by the defendant. The invitation to tender issued by the plaintiff via email dated 28 August 2018 was on offer and capable of immediate acceptance. The hyperlink was not sufficient to incorporate the defendant's terms. The defendant did not make it plain that the defendant's terms were to govern the supply contract by giving reasonable notice of the conditions in a visually prominent way. The defendant's conduct after the termination of the supply contract demonstrated that the defendant knew and accepted that the supply contract between the parties was on the plaintiff's terms. The defendant had failed to demonstrate the existence of an arbitration agreement between the parties and could not rely on s 10 of the Arbitration Act 2005 to stay the proceedings (see paras 43–45, 47–48, 52 & 57).

(2) The stay should not be allowed as the defendant had indicated an election to abandon its rights to a stay of proceedings in favour of arbitration by taking a step in the proceedings. The defendant's conduct from the outset did not indicate an intention to arbitrate. At no point during the exchange of correspondence prior to the filing of the suit was the question of arbitration ever canvassed. The defendant's solicitors' request for an extension of time to serve a defence amounted in law to a step in these proceedings and a submission to the jurisdiction of the court. The learned judicial commissioner declined to exercise the court's power to order a stay of the suit pursuant to s 25 of the Courts of Judicature Act 1964 and O 92 r 4 of the Rules of Court 2012 after finding that the defendant had taken a step in the proceedings. From the affidavit evidence, the defendant had not made out a case of there being multiplicity of proceedings and abuse of process by the plaintiff (see paras 58–59, 63 & 70).

(3) The court agreed with the plaintiff's submissions that there were serious issues to be tried in respect of the plaintiff's claim. The plaintiff's claim was premised upon recognized and sustainable causes of action based on

the breach of the defendant's obligation to ensure the supply of the bunkers that were free from encumbrance. The disputes and differences must be resolved at trial (see para 76).

(4) Damages would be inadequate for the plaintiff if the plaintiff was prevented from litigating in the forum of its choice as expressed and agreed in the supply contract. The plaintiff, a Malaysian shipping company, would have to resort to arbitration in a foreign jurisdiction to enforce contractual rights governed by Malaysian law and subjected to the jurisdiction of the Malaysian courts. The plaintiff's anti-arbitration injunction was to prevent an abuse of process by the defendant in forcing the plaintiff who was not a party to an arbitration agreement to arbitrate in London. The loss of forum was therefore not quantifiable (see para 77).

(5) The balance of convenience lay with the plaintiff. The underlying and material disputes and differences between the parties, all the necessary and relevant parties were before the court and within the jurisdiction of the court. The court was best suited to determine the action. If the stay was not allowed but the anti-arbitration was disallowed, it would result in the plaintiff's action proceeding with the London arbitration. That scenario must be avoided (see paras 78–79).

(6) The defendant's argument that the plaintiff failed to comply with the duty of full and frank disclosure in applying for the injunction as the plaintiff failed to disclose the offer made by the defendant in the email dated 28 August 2018 to the attention of the court in the plaintiff's injunction application was without merit. The duty for full and frank disclosure arose only in an ex parte application for injunctive relief as provided in O 29 r 2A of the ROC 2012. When the injunction application is only heard inter parte, the requirement of full and frank disclosure was no longer a consideration of the court (see paras 80–81).

[Bahasa Malaysia summary

Ini ialah permohonan defendan untuk penggantungan prosiding sementara menunggu timbang tara di London ('lampiran 16'), dan permohonan plaintif untuk mendapatkan injunksi anti-timbang tara untuk menghalang defendan daripada mengambil tindakan selanjutnya dalam prosiding timbang tara di London ('lampiran 22'). Ianya timbul daripada pertikaian yang berbangkit daripada dakwaan kemungkiran oleh defendan di bawah kontrak bekalan bunker antara plaintif sebagai pembeli dan defendan sebagai penjual. Defendan adalah pemilik sebuah kapal dan plaintif adalah pembekal bunker yang diperbadankan di Singapura. Pada 28 Ogos 2018, plaintif telah menjemput defendan dan beberapa pembekal bunker lain untuk memasuki tender pembekalan bunker untuk penghantaran melalui tongkang ke kapal pada 10 September 2018. Beberapa siri emel telah bertukar antara plaintif dan

pegawai defendan pada 28 Ogos 2018 yang membawa kepada tender diberikan kepada defendan. Pada 12 September 2018, pihak-pihak membuat pengaturan yang diperlukan untuk melaksanakan kontrak untuk membekalkan bunker kepada plaintif oleh defendan ('kontrak pembekalan') dan bahagian pertama 2,000 tan metric bunker telah dibekalkan oleh defendan kepada kapal plaintif menurut kontrak pembekalan. Pada hari yang sama, kapal tersebut telah ditahan Agensi Penguatkuasaan Maritim Malaysia ('APMM) atas potensi kesalahan di bawah Akta Kastam Malaysia 1967 berhubung bahagian tersebut. Tangki kapal telah ditutup dan plaintif diperintahkan untuk tidak menggunakan bunker tersebut sementara menunggu penyiasatan selesai. Lanjutan itu, plaintif telah menamatkan kontrak pembekalan atas alasan defendan telah melanggar kewajipannya untuk menghantar bunker tersebut tanpa tuntutan dan bebanan. Dengan persetujuan kedua-dua pihak, kontrak untuk bahagian lain sebanyak 2,000 tan metrik telah dibatalkan. Peguamcara plaintif kemudiannya menghantar surat tuntutan kepada defendan menuntut ganti rugi akibat pelanggaran kontrak defendan. Pada mesyuarat berikutan pelepasan bunker yang ditahan oleh APMM, pihak-pihak bersetuju bahawa plaintif akan membelinya pada harga yang dipersetujui iaitu USD718. Perjanjian tersebut direkodkan dalam surat daripada plaintif bertarikh 19 Disember 2018. Peguamcara defendan mengeluarkan surat kepada peguamcara plaintif menyatakan bahawa mereka akan mengambil arahan anak guam mereka dan akan menjawab apabila mereka telah berbuat demikian. Peguamcara defendan kemudian menulis pada 13 Januari 2020 menafikan bahawa penahanan kapal tersebut berpunca daripada kecuaian defendan atau pelanggaran kontrak. Pada 30 Januari 2020, plaintif menulis sekali lagi menyatakan bahawa defendan melanggar klausa 9.1 dan 11.1 syarat plaintif dan mengatakan bahawa jika pembayaran tidak dibuat dalam masa dua minggu, prosiding akan dimulakan tanpa notis. Pada 28 Mei 2020, plaintif memulakan prosiding terhadap defendan. Pada 14 Ogos 2020, defendan memulakan timbang tara di England. Notis permulaan prosiding timbang tara telah dikeluarkan oleh peguamcara defendan di London, Tetuan Preston Turnbull LLP, kepada plaintif yang menyatakan klausa 21.1 dan 21.2 syarat defendan. Pada pengurusan kes, peguam cara defendan memaklumkan kepada penolong kanan pendaftar bahawa ia telah memfailkan notis permohonan untuk penggantungan prosiding mahkamah di bawah s 10 Akta Timbang Tara 2005 dan bercadang untuk menyampaikannya kepada plaintif. Peguamcara defendan berkata bahawa defendan tidak memfailkan pembelaan kerana ia mencabar bidang kuasa Mahkamah Tinggi Malaysia. Sebagai balasan, penolong pendaftar kanan menyatakan bahawa, mengikut minit mahkamah, defendan telah memohon lanjutan masa dua minggu untuk memfailkan pembelaan dan mahkamah telah mengarahkannya berbuat demikian sebelum 18 Ogos 2020. Pengurusan kes selanjutnya dijalankan di mana peguamcara plaintif telah memaklumkan bahawa peguamcara defendan dan mahkamah bahawa ia memohon untuk injunksi anti-timbang tara. Defendan mengeluarkan injunksi ex parte terhadap plaintif di Mahkamah Tinggi UK,

yang menghalang plaintif daripada meneruskan prosiding di Malaysia dan khususnya klausa 22. Injunksi ex parte telah diketepikan pada pendengaran inter partes. Isu-isu yang timbul untuk ditentukan mahkamah adalah: (a) sama ada defendan telah menunjukkan kewujudan perjanjian timbang tara antara pihak-pihak dan bahawa ia tidak mengambil langkah dalam prosiding mahkamah; dan (b) sama ada injunksi anti-timbang tara patut dibenarkan.

Diputuskan, menolak permohonan defendan ('klausa 16') dan membenarkan permohonan plaintif ('klausa 22') dengan kos:

(1) Kontrak pembekalan adalah atas syarat plaintif yang memperuntukkan undang-undang dan bidang kuasa Malaysia dan bukan atas syarat defendan yang memperuntukkan, antara lain, untuk timbang tara di London. Melihat kepada surat-menyurat secara keseluruhan, pihak-pihak berkontrak atas syarat plaintif supaya, menurut klausa 13.1 syarat plaintif, kontrak pembekalan adalah tertakluk kepada undang-undang Malaysia dan bidang kuasa eksklusif mahkamah Malaysia. Kontrak pembekalan telah dimeterai pada 28 Ogos 2018 atas terma plaintif. Klausa 14.2 syarat plaintif, yang merupakan klausa 'keseluruhan perjanjian' yang menggantikan semua rundingan, representasi atau perjanjian sebelumnya, lisan atau bertulis adalah berkuat kuasa. Kontrak pembekalan tidak dibuat selepas 28 Ogos 2018 dan diterima melalui tindak tanduk seperti yang dihujahkan oleh defendan. Pelawaan tender yang dikeluarkan oleh plaintif melalui emel bertarikh 28 Ogos 2018 adalah penawaran dan boleh diterima serta-merta. Perhubungan tidak mencukupi untuk memasukkan syarat defendan. Defendan tidak menyatakan dengan jelas bahawa syarat defendan adalah untuk mengawal kontrak pembekalan dengan memberikan notis munasabah tentang syarat-syarat tersebut dengan cara yang jelas. Kelakuan defendan selepas penamatan kontrak pembekalan menunjukkan bahawa defendan mengetahui dan menerima bahawa kontrak pembekalan antara pihak-pihak adalah mengikut terma plaintif. Defendan telah gagal untuk menunjukkan kewujudan perjanjian timbang tara antara pihak-pihak dan tidak boleh bergantung pada s 10 Akta Timbang Tara 2005 untuk menangguhkan prosiding (lihat perenggan 43–45, 47–48, 52 & 57).

(2) Penggantungan tersebut tidak boleh dibenarkan kerana defendan telah menunjukkan pilihan untuk melepaskan haknya untuk menggantung prosiding kepada timbang tara dengan mengambil langkah dalam prosiding tersebut. Tindakan defendan dari awal lagi tidak menunjukkan niat untuk menimbang tara. Tidak ada pada masa pertukaran surat-menyurat sebelum pemfailan saman, persoalan timbang tara pernah dibincangkan. Permintaan peguamcara defendan untuk lanjutan masa untuk menyampaikan pembelaan mengikut undang-undang merupakan satu langkah dalam prosiding ini dan penyerahan kepada

bidang kuasa mahkamah. Pesuruhjaya kehakiman yang bijaksaan enggan menggunakan kuasa mahkamah untuk memerintahkan penggantungan saman tersebut menurut s 25 Akta Mahkamah Kehakiman 1964 dan A 92 k 4 Kaedah-Kaedah Mahkamah 2012 selepas mendapati defendan telah mengambil langkah dalam prosiding. Daripada keterangan afidavit, defendan tidak membuktikan kes bahawa terdapat prosiding berganda dan penyalahgunaan proses oleh plaintif (lihat perenggan 58–59, 63 & 70).

(3) Mahkamah bersetuju dengan hujahan plaintif bahawa terdapat isu serius yang perlu dibicarakan berkenaan dengan tuntutan plaintif. Tuntutan plaintif adalah berdasarkan kausa tindakan yang dikenalpasti dan dipertahankan berdasarkan pelanggaran kewajipan defendan untuk memastikan bekalan bunker bebas daripada bebanan. Pertikaian dan perbezaan mesti diselesaikan dalam perbicaraan (lihat perenggan 76).

(4) Kerugian adalah tidak mencukupi untuk plaintif jika plaintif dihalang daripada litigasi dalam forum pilihannya seperti yang dinyatakan dan dipersetujui dalam kontrak pembekalan. Plaintif, sebuah syarikat perkapalan Malaysia, perlu menggunakan timbang tara dalam bidang kuasa asing untuk menguatkuasakan hak kontrak yang dikawal oleh undang-undang Malaysia dan tertakluk kepada bidang kuasa mahkamah Malaysia. Injunksi anti-timbang tara plaintif adalah untuk mengelakkan penyalahgunaan proses oleh defendan dalam memaksa plaintif yang bukan pihak dalam perjanjian timbang tara untuk menimbang tara di London. Oleh itu, kehilangan forum tidak boleh diukur (lihat perenggan 77).

(5) Imbangan kesesuaian terletak pada plaintif. Pertikaian dan perbezaan asas dan material antara pihak-pihak, semua pihak yang perlu dan berkaitan berada di hadapan mahkamah dan dalam bidang kuasa mahkamah. Mahkamah paling sesuai untuk menentukan tindakan. Sekiranya penggantungan tersebut tidak dibenarkan tetapi anti-timbang tara itu tidak dibenarkan, ia akan menyebabkan tindakan prosiding plaintif dengan timbang tara London. Senario tersebut harus dielakkan (lihat perenggan 78–79).

(6) Pendapat defendan bahawa plaintif gagal mematuhi kewajipan pendedahan penuh dan terus terang dalam memohon injunksi kerana plaintif gagal mendedahkan tawaran yang dibuat oleh defendan dalam emel bertarikh 28 Ogos 2018 kepada perhatian mahkamah dalam permohonan injunksi plaintif adalah tanpa merit. Kewajipan untuk pendedahan penuh dan terus terang timbul hanya dalam permohonan ex parte untuk relif injunksi seperti yang diperuntukkan dalam A 29 k 2A KKM 2012. Apabila permohonan injunksi hanya didengar secara inter parte, keperluan pendedahan penuh dan terus terang bukan lagi satu pertimbangan mahkamah (lihat perenggan 80–81).]

Cases referred to

Albilt Resources Sdn Bhd v Casaria Construction Sdn Bhd [2010] 3 MLJ 656; [2010] 7 CLJ 785, CA (refd)

Amazing Place Sdn Bhd v Couture Homes Sdn Bhd & Anor [2011] 7 MLJ 52, HC (refd)

American Cyanamid v Ethicon Ltd [1975] 1 All ER 504, HL (refd)

APFT Bhd v Dato' Faruk bin Othman [2018] MLJU 1471; [2018] 1 LNS 1859, HC (refd)

Brighton Marine Palace and Pier Ltd v Woodhouse [1893] 2 Ch 486, ChD (refd)

C & B Global Sdn Bhd v Getthiss (M) Sdn Bhd [2019] MLJU 347, HC (distd)

Cockett Marine Oil DMCC v Ing Bank NV & Anor [2019] EWHC 1533 (Comm), QBD (refd)

Deutsche Bank (M) Bhd v MBf Holdings Bhd & Anor [2015] 6 MLJ 310; [2015] 8 CLJ 1068, FC (refd)

Ford's Hotel Co Ltd v Barlett [1896] AC 1, HL (refd)

Hamidah Fazilah Sdn Bhd v Universiti Tun Husein Onn Malaysia [2017] 7 MLJ 274, HC (distd)

Hui Jia Hao v Perdana Park City Sdn Bhd & Anor [2012] 8 MLJ 385; [2011] 1 LNS 595, HC (refd)

Impala Warehousing and Logistics (Shanghai) Co Ltd v Wanxiang Resources (Singapore) Pte Ltd [2015] EWHC 811 (Comm), QBD (refd)

Ives & Barker v Willans [1894] 2 Ch 478, CA (refd)

Keet Gerald Francis v Mohd Noor bin Abdullah [1995] 1 MLJ 193, CA (refd)

Kinetic Motion Sdn Bhd v Sabah Net Sdn Bhd [2020] MLJU 848, HC (distd)

Leasing Corporation Sdn Bhd v Indah Lestari Sdn Bhd [2007] 7 MLJ 506, CA (distd)

Mung Seng Fook v AIG Insurance Bhd [2019] 7 MLJ 59, HC (refd)

Nam Fatt Corp Bhd & Anor v Petrodar Operating Co Ltd & Anor [2011] 7 MLJ 305; [2010] 9 CLJ 732, HC (distd)

Orange Business Services (Network) Sdn Bhd v Dealtel (Malaysia) Sdn Bhd and another suit [2019] MLJU 477; [2019] 1 LNS 771, CA (refd)

Perbadanan Setiausaha Kerajaan Selangor v Metroway Sdn Bhd [2003] 3 MLJ 522, CA (refd)

Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd [2016] 5 MLJ 417, FC (refd)

Sanwell Corporation v Trans Resources Corporation Sdn Bhd [2002] 2 MLJ 625; [2002] 3 CLJ 213, FC (refd)

Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 MLJ 97; [1994] 2 CLJ 716, SC (refd)

Sterling Hydraulics Ltd v Dichtomatic Ltd [2006] EWHC 2004, HC (refd)

TNB Fuel Services Sdn Bhd v China National Coal Group Corp [2013] 4 MLJ 857, CA (refd)

Tahan Steel Corporation Sdn bhd v Bank Islam Malaysia Berhad [2004] 6 MLJ 1; [2004] 3 AMR 43, HC (refd)

Transformers & Rectifiers Ltd v Needs Ltd [2015] EWHC 269, HC (refd)

Winsin Enterprise Sdn Bhd v Oxford Talent (M) Sdn Bhd [2009] MLJU 286; [2010] 3 CLJ 634, HC (refd)

Legislation referred to

Arbitration Act 2005 s 10
Contracts Act 1950 s 7
Courts of Judicature Act 1964 s 25
Evidence Act 1950 s 114(e)
Rules of Court 2012 O 3 r 5(1), O 18, O 19, O 29 r 2A, O 34 r 1, O 92 r 4

Arun Krishnalingam (Aaron Siva with him) (Sativale Mathew Arun) for the plaintiff.
James David (Foo Siew Yin with him) (Shaikh David & Co) for the defendant.

Atan Mustaffa JC:

[1] This judgment concerns an application for stay of proceedings pending arbitration in London ('encl 16') by the defendant, Cockett Marine Oil (Asia) Pte Ltd, against the plaintiff, MISC Berhad, and the plaintiff's anti-arbitration injunction (encl 22) to restrain the defendant to take further steps in the arbitration proceedings in London. This arose from a dispute arising from an alleged breach by the defendant under a bunker supply contract between the plaintiff as buyer and the defendant as seller.

[2] At the hearing of this application I dismissed encl 16 and allowed encl 22 with costs on 7 January 2021. This judgment contains the full grounds for my decision.

Background Facts

[3] The defendant is the owner of the vessel 'SERI AMANAH' ('the vessel') and the claimant is a bunker supplier incorporated in Singapore. On 28 August 2018 the plaintiff invited the defendant and a number of other bunker suppliers to tender for the supply of bunkers for delivery by barge to the vessel on 10 September 2018. This tender had the reference C-MISC-FIN-TCM-QBSP-2018-0017 ('the tender').

[4] A series of emails were exchanged between the plaintiff and defendant's officers on 28 August 2018 leading to the tender being awarded to the defendant. The communications between the plaintiff and the defendant started with an email being sent at 0941 hours from the plaintiff's tender secretariat inviting the defendant to put in its bid. In the email, the plaintiff's Proposal Form and the plaintiff's Terms and Conditions of Bunker Spot purchase ('the plaintiff's terms') were attached. In the body of the email under

the heading 'Important Note', item 9 states '9. TERMS AND CONDITIONS (SPOT PURCHASE). Details MISC's Terms and Conditions (spot purchase) is as per attached which are to be applied for this spot purchase'. Clause 13 of the plaintiff's terms states:

> 13. Governing Law
>
> 13.1 The provisions of this Agreement shall be subject to and construed and interpreted is accordance with the laws of Malaysia and the parties hereto submit to the exclusive jurisdiction of Malaysian courts.

[5] Later on the same day, the defendant issued an email to the tender secretariat at 1500 hours making an offer to supply bunker fuel at USD725 per metric ton including barging. In response, at 1546 hours the plaintiff sent an email stating 'You have been shortlisted. Please requote your best offer'. The reply from the defendant came at 1554 hours and in the defendant's email, the defendant stated that bunker fuel could be supplied at USD724 per metric ton. A telephone conversation then ensued between the plaintiff and the defendant's officers and the defendant issued an email at 1618 hours to state the price of USD718 per metric ton. The plaintiff responded with an email at 1622 hours agreeing to fix the price at USD718 per metric ton and almost one hour later at 1721 hours the plaintiff again wrote to the defendant to confirm the price of USD718 per metric ton for the supply of bunker fuel. In the defendant's emails of 28 August 2018 at 1500 hours, 1554 hours and 1618 hours, the words appearing under the sign off line are:

> Fuel Supply Terms & Conditions
>
> Privacy Notice.

[6] The words 'Fuel Supply Terms & Conditions' carry a hyperlink to the defendant's website containing the Fuel Supply Terms & Conditions ('the defendant's terms').

[7] Two days later, on 30 August 2018 at 1559 hours following a further telecon with the plaintiff, the defendant wrote to the plaintiff to confirm the price at USD718 per metric ton. In the body of this email, there was a reference to the following statement:

> Terms & Conditions (updated November 2015)
>
> This contract is made subject to our standard terms and conditions of sale ('the standard terms') current at the date hereof a copy of which can be read and downloaded by visiting http://www.cockettgroup.com/information/terms-conditions/. By acknowledging your agreement to this transaction you confirm and represent that you have read and agree to the standard terms and agree that such terms are incorporated into the contract made between us as if the same were expressly set out in writing below.

[8] On 12 September 2018 the parties made the necessary arrangements to perform the contract to supply bunkers to the plaintiff by the defendant ('the supply contract') and the first parcel of 2,000 metric ton of bunkers was supplied by the defendant to the plaintiff's vessel pursuant to the suppy contract. On the same day the vessel was detained by the Malaysian Maritime Enforcement Agency (MMEA) for potential offences under the Malaysian Customs Act 1967 in relation to that parcel. The vessel's tank was sealed and the plaintiff was ordered not to use the bunkers pending the completion of an investigation.

[9] Subsequently, the plaintiff terminated the supply contract on the grounds that the defendant was in breach of its obligation to deliver the bunkers free of claims and encumbrances. By agreement of the parties, the contract for the other parcel of 2,000 metric ton was cancelled.

[10] On 26 November 2019, the plaintiff's solicitors sent a letter of demand to the defendant claiming damages arising from the defendant's breach of contract. In this letter the plaintiff's solicitors referred to the contract being dated 28 August 2018 and to the breaches alleged being breaches of the plaintiff's terms, specifically cll 9.1 and 11.1, stating:

> Clauses 9.1 and 11.1 of the MISC Terms and Conditions of Bunker Spot Purchase, which is expressly incorporated into the contract dated 28th August 2018, is relevant.

[11] At a meeting on the 6 December 2018, following the release by the MMEA of the detained bunkers, the parties agreed that the plaintiff would buy them at the agreed price of USD718. That agreement was recorded in a letter from the plaintiff dated 19 December 2018 which said amongst other things that 'both parties have agreed during the meeting to enter into a new contract for the supply of bunkers based on the same quoted price of US$718/mt and MISC Terms and Conditions as per the bidding document ... dated the 28th August 2018'.

[12] The defendant's solicitors issued a letter dated 10 December 2019 to the plaintiff's solicitors stating that they were taking their client's instructions and would revert when they had done so. The defendant's solicitors then wrote on 13 January 2020 denying that the detention of the vessel flowed from the defendant's negligence or breach of contract. The only contract mentioned in the letter is the contract dated 28 August 2018 in the subject heading.

[13] On 30 January 2020, the plaintiff's solicitors wrote again stating that the defendant was in breach of cll 9.1 and 11.1 of the plaintiff's terms and saying that if payment was not made within two weeks proceedings would be commenced without notice.

A **[14]** On 4 March 2020, the defendant's solicitors replied by saying that 'your assertion that cl 9.1 should be read to include a duty to 'ensure that the authorities would have no reason even to contemplate investigations' is far-fetched. There is no ambiguity in the contract clauses you refer to and any court will interpret the same within its four corners'.

B

[15] On 28 May 2020, the plaintiff commenced these proceedings (encl 1).

[16] On 1 July 2020, having obtained leave to serve out of the jurisdiction in Singapore, the plaintiff's solicitors wrote to the defendant's solicitors asking C them whether they had instructions to accept service of the cause papers. On 3 July 2020, the defendant's solicitors said that they had instructions to accept service of the cause papers on behalf of the claimant 'without prejudice to their rights in relation to the proper jurisdiction of the dispute'.

D

[17] On 8 July 2020, the writ and statement of claim were served. The defendant entered appearance on 20 July 2020. On 4 August 2020, a case management took place by way of email exchange before the Senior Assistant Registrar. The defendant's solicitors stated, 'Kami memohon dua minggu E daripada hari ini (iaitu 18.8.2020) untuk memfaitkan Pembelaan Defendan'. The plaintiff responded saying that it had no objection and the defendant's solicitors then said again, '... kami memohon untuk satu arahan untuk memfailkan Pembelaan pada 18.8.2020'. The senior assistant registrar granted this application for an extension of time.

F

[18] On 14 August 2020, the defendant commenced arbitration in England. A Notice of Commencement of Arbitration Proceedings was issued by the defendant's solicitors in London, Messrs Preston Turnbull LLP, to the plaintiff citing cl 21.1 and 21.2 of the defendant's terms.

G

[19] At a case management on 18 August 2020, the defendant's solicitors informed the senior assistant registrar that the previous day, it had filed a notice of application to stay the court proceedings under s 10 of the Arbitration Act 2005 and was proposing to serve it on the plaintiff. The defendant's solicitors H said that the defendant did not file a defence because it was challenging the jurisdiction of the Malaysian High Court.

[20] In response, the senior assistant registrar said that according to the court's minutes the defendant had applied for an extension of time of two I weeks to file the defence and the court had ordered it to do so on or before 18 August 2020.

[21] A further case management took place on 24 August 2020 before the admiralty judge at which the plaintiff's counsel informed the defendant's

counsel and the court that it was applying for an anti-arbitration injunction. This application was filed on 25 August 2020 as encl 22.

[22] On 26 August 2020, the defendant took out an ex parte injunction against the plaintiff in the UK High Court, injuncting the plaintiff from proceeding with Malaysian proceedings and encl 22 in particular. On 16 September 2020, that ex parte injunction was set aside at the inter partes hearing.

THE APPLICATIONS

[23] In encl 16, the defendant prays mainly for the following orders:

(a) all proceedings in this action be stayed pending arbitration in London between the parties herein; and

(b) the court's direction to file the defence by 18 August 2020 be stayed pending arbitration in London between the parties herein.

[24] In encl 22, the plaintiff prays mainly for the following order:

> That the defendant by themselves, their servants or agents or otherwise howsoever be restrained and a permanent injunction be granted to restrain the defendant by themselves, their servants or agents or otherwise howsoever from commencing, continuing, maintaining or taking any further steps in the arbitral proceedings issued by way of the Notice of Commencement of Arbitration Proceedings dated 14.8.2020.

RELEVANT LAW

[25] The stay of proceedings pending an arbitration is governed by s 10 of the Arbitration Act 2005 which provides:

> 10 Arbitration agreement and substantive claim before court
>
> (1) A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed'.

[26] Two prerequisites to the operation of s 10 are critical for the court's consideration for the purpose of encl 16 where the applicant for a stay thereunder must first demonstrate:

(a) that there is the existence of an arbitration agreement between the parties; and

(b) that it has not taken a step in the court proceedings.

[27] Section 10 found application more recently in the Federal Court case of *Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd* [2016] 5 MLJ 417. Ramly Ali FCJ in delivering the judgment outlined the requirements of the application of s 10 of the Arbitration Act 2005 and held that if nothing negates the arbitration clause, the court must order a stay of proceedings and refer the matter to arbitration:

> [38] The court must acknowledge the competency of an arbitral tribunal to decide on its own jurisdiction without interference. The intention of Parliament is clear. Reading ss 8, 10 and 18 together would indicate that Parliament has given the arbitral tribunal much wider jurisdiction and powers; and such powers extend to cases where even its own jurisdiction or competence or the scope of its authority, or the existence or validity of the arbitration agreement or clause, is challenged. To comply with the the issue of whether there is in existence a binding arbitration agreement or clause between the parties and whether the arbitration agreement or clause is null and void, inoperative or incapable of being performed. If the court is satisfied that the arbitration agreement or clause does not fall into any of these exceptions, it must order a stay of proceedings and refer the matter to arbitration.

[28] In respect of the anti arbitration injunction, as the injunction principles are trite and well settled, I can do no better than to refer to *American Cyanamid v Ethicon Ltd* [1975] 1 All ER 504 and *Keet Gerald Francis v Mohd Noor bin Abdullah* [1995] 1 MLJ 193.

[29] The principle of law governing application for interlocutory injunction is laid down in *American Cyanamid v Ethicon Ltd*. It was held in the case that in granting an interlocutory injunction the court must be satisfied that there is a serious question to be tried. If there is, the status quo must be preserved. Lord Diplock in delivering judgment of the House in that case said:

> The use of such expressions as 'prohibitory', 'a prima facie case' or 'a strong prima facie case' in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried

[30] In *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* Gopal Sri Ram JCA (as he then was) had provided the following guidelines to the courts in determining whether interlocutory injunction is to be granted or otherwise in any given case:

> [31] To summarize, a judge hearing an application for an interlocutory injunction should undertake an inquiry along the following lines:
>
> (1) He must ask himself whether the totality of the facts presented before him discloses a bona fide serious issue to be tried. He must, when considering this question, bear in mind that the pleadings and evidence are incomplete at that stage. Above all, he must refrain from making any determination

on the merits of the claim or any defence to it. It is sufficient if he identifies with precision on the issues raised on the joinder and decides whether these are serious enough to merit a trial. If he finds, upon a consideration of all the relevant material before him, including submissions of counsel, that no serious question is disclosed, that is an end of the matter and the relief is refused. On the other hand, if he does find that there are serious question to be tried, he should move on to the next step of his inquiry;

(2) Having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies. In making his assessment, he must take into account all relevant matters including the practical realities of the case before him. He must weigh the harm that the injunction would produce by its grant against the harm that would result from its refusal. He is entitled to take into account, inter alia, the relative financial standing of the litigants before him. If after weighing all matters, he comes to the conclusion that the plaintiff would suffer greater injustice if relief is withheld, then he would be entitled to grant the injunction especially if he is satisfied that the plaintiff is in a financial position to meet his undertaking in damages. Similarly if he concludes that the defendant would suffer the greater injustice by the grant of an injunction, he would be entitled to refuse relief ...

(3) The judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper and intended to maintain the status quo,. Accordingly, the judge would be entitled to take into account all discretionary considerations, such as delay in the making of the application or any adequate alternative remedy that would satisfy the plaintiff's equity, such as an award of monetary compensation in the event that he succeeds in establishing his claim at the trial. Any question going to the public interest may, and in appropriate cases should, be taken into account ...

Enclosure 16 — Defendant's application for stay pending arbitration

[31] The part of the judgment below relate to encl 16 which is the defendant's application for a stay pending arbitration.

THE PLAINTIFF'S SUBMISSIONS

[32] The position taken by the plaintiff is that there is no arbitration agreement between the parties and the defendant cannot rely on s 10 of the Arbitration Act 2005 to stay these proceedings.

[33] The plaintiff submitted that the parties contracted on the plaintiff's terms so that, by virtue of cl 13.1 of the plaintiff's terms their contract is the subject to Malaysian law and the exclusive jurisdiction of the Malaysian court. This is contrary to the defendant's contention that the parties contracted on the

defendant's terms which provided for disputes to be referred to arbitration in London. According to the plaintiff, the supply contract was already concluded between the plaintiff and the defendant when at 1622 hours on 28 August 2018, the plaintiff responded stating 'We confirm to fix with Cockett, with final price of USD 781/MT delivered'. At this point the supply contract was formed. Further to this, the plaintiff submitted and contended as follows:

(a) the plaintiff's invitation to tender sent on 28 August 2018 at 0941 hours stated stated '9. TERMS AND CONDITIONS (SPOT PURCHASE) Details MISC's Terms and Conditions (spot purchase) is as per attached which are to be applied for this spot purchase'. The standard terms attached included cl 13.1 stating:

> The provisions of this Agreement shall be subject to and construed and interpreted in accordance with the laws of Malaysia and the parties hereto submit to the exclusive jurisdiction of Malaysian courts.

(b) the supply contract was formed when at 1622 hours on 28 August 2018 when the plaintiff stated in its email 'We confirm to fix with Cockett, with final price of USD 781/MT delivered'. This was in response to the defendant's email sent at 1618 hours stating 'Amended, best offer USD718.00 pmtd include barging';

(c) although the defendant's email sent at 1500 hours and at 1618 hours on 28 August 2018 contained a hyperlink to the defendant's terms and to a privacy notice the plaintiff was the only party that had expressly referred to its standard terms and conditions being applied to the supply contract;

(d) it was only two days later after the supply contract was formed that at 1559 hours on 30 August 2018, the defendant sent an email which it described as a 'confirmation', stating 'we are now able to confirm having placed the following bunker nomination'. This was the first communication to contain a statement that the defendant's terms applied, as opposed to simply containing a hyperlink;

(e) the bunker nomination could only have been placed if there was a validly binding contract between the parties and this contract was on the plaintiff's standard terms and conditions, upon the plaintiff sending its email at 1622 hours on 28 August 2018;

(f) the plaintiff's terms also provided in cl 14.2 that it constitutes the entire agreement between the parties and it is provided in cl 14.5 that no modification would be effective unless in writing and signed by both parties:

Clause 14.2:

> 14.2 This Agreement constitutes the entire agreement between the Seller and

Buyer and it supersedes all prior negotiations, representations or agreements, oral or written.

Clause 14.5:

No modification and/or amendments to the terms of this Agreement shall be effective unless in writing and signed by both Seller and Buyer.

[34] Still on the issue of whose terms apply, the plaintiff also submitted that the defendant's conduct after the termination of the supply contract shows that that the defendant knew and accepted that the supply contract between the parties was on the plaintiffs terms. In relation to this, the plaintiff submitted and contended as follows:

(a) the new contract for the purchase of the bunkers after release from MMEA was for the same purchase price and on the plaintiff's terms. The plaintiff issued a letter dated 19 December 2018 to the defendant stating both parties have agreed to enter into a new contract for the supply of the bunkers based on the same quoted price of USD718/mt and the plaintiff's terms as per the bidding document which was confirmed by the defendant in the attached acceptance confirmation sheet; and

(b) in the exchange of correspondence preceding the institution of this action, the defendant's solicitors' letters of 13 January 2020 of 4 March 2020 refer to the supply contract concluded on 28 August 2018 on the plaintiff's terms and does not raise the possibility that the defendant's terms apply.

[35] The plaintiff also takes the position that, even if the supply contract was not on the plaintiff's terms, the defendant submitted to the Malaysian High Court in this suit when they took a step in the proceedings, thus displacing its right to arbitration, even if it exists. The plaintiff relied on the case of *Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97; [1994] 2 CLJ 716 (SC) which requires the conduct of the applicant for a stay to be examined to show that there was an indication of an election to abandon that party's rights to a stay. The plaintiff contended that there is such an election here and the defendant evinced an intention to abandon its rights to pursue the matter by way of arbitration from the following:

(a) the defendant's conduct from the outset did not indicate an intention to arbitrate as during the exchange of correspondence prior to the filing of the suit, the question of arbitration was never canvassed;

(b) when the defendant's solicitors notified the plaintiff's solicitors that they had instructions to accept service of cause papers without prejudice to their client's rights in relation to the issue of jurisdiction, their conduct

during the case management of 4 August 2020 no longer makes reference to this reservation. Instead the defendant's solicitor sought an extension of time to file the defence with no reference to the question of stay;

(c) the reservation contained in the defendant's solicitors' letter of 3 July 2020 is one of a kind commonly inserted in communications of this kind, out of an abundance of caution, where solicitors are asked to accept service in circumstances where permission to serve out has been given and they have not seen the cause papers;

(d) the case management minutes make no reference of the defendant's reservation of jurisdiction but instead shows that the defendant was actively involved in case management to ensure that its defence was filed when they could have indicated to the senior assistant registrar much earlier before the extension of time was granted to file the defence that an application for stay was to be filed or was being contemplated; and

(e) by applying for the extension of time to file the defence and by not bringing to the attention of the court their instructions to file an application for stay this is tantamount to steps in the proceedings and an abandonment of the reservation of right to refer the matter to arbitration.

THE DEFENDANT'S SUBMISSIONS

[36] The defendant's submission is that the supply contract was on the defendant's terms as the hyperlink to the defendant's 'Fuel Supply Terms and Supply' on its website was included in the defendant's emails of 28 August 2018 at 1500 hours and 1554 hours which is easily accessible by clicking the hyperlink. The defendant cited the cases of *Impala Warehousing and Logistics (Shanghai) Co Ltd v Wanxiang Resources (Singapore) Pte Ltd* [2015] EWHC 811 (Comm) and *Cockett Marine Oil DMCC v Ing Bank NV & Anor* [2019] EWHC 1533 (Comm) which decided in favour of parties which included hyperlinks to their terms and conditions in their emails as a manner of incorporating these terms into the relevant contracts. The defendant submitted that even if the supply contract between the parties was formed on 28 August 2018 at 1622 hours, the defendant's terms as referred to by way of the hyperlink in the defendant's email of 28 August 2018 at 1618 hours will apply. Clicking on the hyperlink would take the reader of the email to the defendant's 'Standard Terms and Conditions For the Sale of Marine Bunker Fuels, Lubricant and other Products' on the defendant's website which contained cl 21.1 and 21.2 as follows:

> 21.1 JURISDICTION The Agreement and all claims and disputes arising under or in connection with the Agreement shall be governed by English law and any dispute arising out of or in connection with the Agreement shall be subject to the

non-exclusive jurisdiction of the English Courts. So however that nothing in this Clause shall, in the event of a breach of the Agreement by the Buyer, preclude the Company from taking any such action as it shall in its absolute discretion consider necessary, the Company shall have the power to enforce a judgment of the English Courts (whether or not subject to appeal), safeguard and/or secure its claim under the Agreement in any court or tribunal or any state or country.

21.2 Any dispute arising out of or in connection with this Contract shall be referred to arbitration in London or elsewhere as mutually agreed, in accordance with eh UK Arbitration Act 1996 or any statutory modification or re-enactment thereof save to the extent necessary to give effect to the provisions of this Clause. The arbitration shall be conducted in accordance with the London Mantime Arbitrators Association (LMAA) Terms current at the time when the arbitration proceedings are commenced.

[37] The defendant further submitted that by way of the defendant's email of 30 August 2018 at 1559 hours which contained additional details and terms, a counter offer was made to any offer made by the plaintiff. It is the defendant's contention that this was a counter offer because there was no absolute acceptance of offers either way before that pursuant to s 7 of the Contracts Act 1950 which prescribes that acceptance must be absolute and unqualified. A conditional acceptance in law is in effect a rejection. In this respect, by accepting the bunker supply without raising any further objection, the plaintiff had accepted the supply contract on the defendant's terms expressly, impliedly and/or by conduct.

[38] On the issue of taking a step in the proceedings, the defendant submitted that the defendant has not demonstrated an unequivocal intention to submit to the jurisdiction of Malaysian courts or taken a step in the proceedings. Even if the defendant asked for a time extension to file a defence during a case management, the defendant denied that it took a step in the proceedings and subject itself to the Malaysian court jurisdiction. The defendant referred to me the English case of *Ford's Hotel Co Ltd v Barlett* [1896] AC 1 for the proposition that for a request to obtain a time extension to file a defence to be deemed to be a step in the proceedings, this needs to be made by way of a formal application to court. This is the same position as held by the English Court of Appeal case of *Ives & Barker v Willans* [1894] 2 Ch 478.

[39] Further the defendant submitted that the request for an extension of time to file the defence was made to the Senior Assistant Registrar during case management which was agreed by the plaintiff's solicitors without any qualification and this is not taking a step in the proceedings. To support this submission, the defendant referred the court to *Brighton Marine Palace and Pier Ltd v Woodhouse* [1893] 2 Ch 486 which held that obtaining an extension

of time by consent is not steps as this was only measure before deciding whether to actually to take the next step.

[40] In the same vein, the defendant argued that mandatory steps taken in compliance with the Rules of Court 2012 ('the ROC 2012') and steps taken in compliance with directions given by the court would not amount to taking steps in the proceedings because it was not done voluntarily but out of necessity pursuant to the directions given by the court or the ROC 2012. The defendant cited the following cases to advance these submissions: *C & B Global Sdn Bhd v Getthiss (M) Sdn Bhd* [2019] MLJU 347; *Kinetic Motion Sdn Bhd v Sabah Net Sdn Bhd* [2020] MLJU 848; *Hamidah Fazilah Sdn Bhd v Universiti Tun Husein Onn Malaysia* [2017] 7 MLJ 274; *Nam Fatt Corp Bhd & Anor v Petrodar Operating Co Ltd & Anor* [2011] 7 MLJ 305; [2010] 9 CLJ 732.

[41] The defendant explained that when the defendant's solicitors represented to the the senior assistant registrar during the case management on 4 August 2020 before the High Court Registrar for a two week extension to file the defence to which the plaintiff's solicitors replied that they had no objection. The defendant contended that no order was granted or filed for such request and the request was made not voluntarily but out of necessity pursuant to O 18 and O 19 of the ROC 2012 and should not be deemed as abandoning the right to challenge the jurisdiction of Malaysian courts.

[42] The defendant further submitted that the court has inherent power even if it determines that defendant had taken a step in the proceedings to look at factors such as multiplicity of proceedings and abuse of process to determine whether a stay should be granted, relying *Orange Business Services (Network) Sdn Bhd v Dealtel (Malaysia) Sdn Bhd and another suit* [2019] MLJU 477; [2019] 1 LNS 771 and *Albilt Resources Sdn Bhd v Casaria Construction Sdn Bhd* [2010] 3 MLJ 656; [2010] 7 CLJ 785.

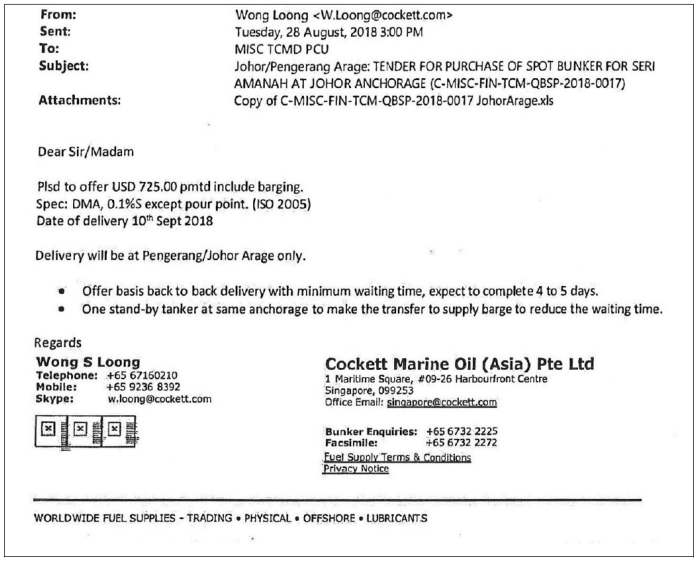
ANALYSIS AND FINDINGS

The supply contract is on the plaintiff's terms

[43] It is the court's finding that the supply contract was on the plaintiff's terms which provided for Malaysian law and jurisdiction and not on the defendant's terms which provided, inter alia, for arbitration in London. Looking at the correspondence as a whole (see *Deutsche Bank (M) Bhd v MBf Holdings Bhd & Anor* [2015] 6 MLJ 310; [2015] 8 CLJ 1068 (FC)), I found that the parties contracted on the plaintiff's terms so that, by virtue of cl 13.1 of the plaintiff's terms, the supply contract is the subject to Malaysian law and the exclusive jurisdiction of the Malaysian court. The following are relevant:

(a) the invitation to tender (the plaintiff's email dated 28 February 2018 at 0941 hours) states that the recipients were invited to tender using the form provided and on the basis that it was the plaintiff's terms that were to apply. Paragraph 9 under heading of 'IMPORTANT NOTE' within the 0941 hours email clearly stated that the plaintiff's terms for spot purchase was attached to the form which are to be applied for this spot purchase;

(b) the defendant then submitted the form duly completed under cover of the defendant's email dated 28 August 2018 at 1500 hours (containing the defendant's hyperlink). The entire email is reproduced below:



From: Wong Loong <W.Loong@cockett.com>
Sent: Tuesday, 28 August, 2018 3:00 PM
To: MISC TCMD PCU
Subject: Johor/Pengerang Arage: TENDER FOR PURCHASE OF SPOT BUNKER FOR SERI AMANAH AT JOHOR ANCHORAGE (C-MISC-FIN-TCM-QBSP-2018-0017)
Attachments: Copy of C-MISC-FIN-TCM-QBSP-2018-0017 JohorArage.xls

Dear Sir/Madam

Plsd to offer USD 725.00 pmtd include barging.
Spec: DMA, 0.1%S except pour point. (ISO 2005)
Date of delivery 10th Sept 2018

Delivery will be at Pengerang/Johor Arage only.

- Offer basis back to back delivery with minimum waiting time, expect to complete 4 to 5 days.
- One stand-by tanker at same anchorage to make the transfer to supply barge to reduce the waiting time.

Regards

Wong S Loong
Telephone: +65 67160210
Mobile: +65 9236 8392
Skype: w.loong@cockett.com

Cockett Marine Oil (Asia) Pte Ltd
1 Maritime Square, #09-26 Harbourfront Centre
Singapore, 099253
Office Email: singapore@cockett.com

Bunker Enquiries: +65 6732 2225
Facsimile: +65 6732 2272
Fuel Supply Terms & Conditions
Privacy Notice

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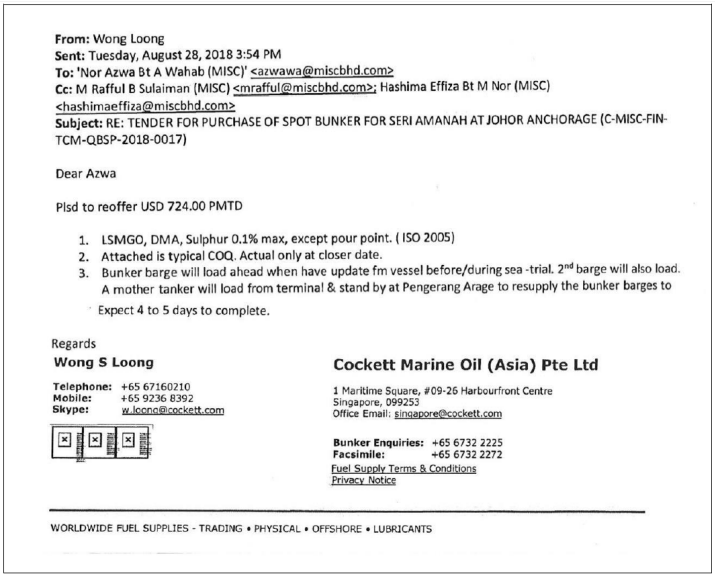
(c) the 1500 hours email did not state that the defendant's offer was made pursuant to the invitation was a counter offer on the plaintiff's terms. It offered to supply a specific quantity at a specific price (USD725) made on the form, which incorporated the tender number specified by the plaintiff (C-MISC-FIN-TCM-QPSB-2018-0016). This was also true of the defendant's email at 1554 (again containing the defendant's hyperlink) on the same da which reoffered the price at USD724. The entire email is reproduced below:

A



From: Wong Loong
Sent: Tuesday, August 28, 2018 3:54 PM
To: 'Nor Azwa Bt A Wahab (MISC)' <azwawa@miscbhd.com>
Cc: M Rafful B Sulaiman (MISC) <mrafful@miscbhd.com>; Hashima Effiza Bt M Nor (MISC) <hashimaeffiza@miscbhd.com>
Subject: RE: TENDER FOR PURCHASE OF SPOT BUNKER FOR SERI AMANAH AT JOHOR ANCHORAGE (C-MISC-FIN-TCM-QBSP-2018-0017)

B

Dear Azwa

Plsd to reoffer USD 724.00 PMTD

1. LSMGO, DMA, Sulphur 0.1% max, except pour point. (ISO 2005)
2. Attached is typical COQ. Actual only at closer date.
3. Bunker barge will load ahead when have update fm vessel before/during sea -trial. 2nd barge will also load. A mother tanker will load from terminal & stand by at Pengerang Arage to resupply the bunker barges to

Expect 4 to 5 days to complete.

C

Regards

Wong S Loong

Telephone: +65 67160210
Mobile: +65 9236 8392
Skype: w.loong@cockett.com

Cockett Marine Oil (Asia) Pte Ltd

1 Maritime Square, #09-26 Harbourfront Centre
Singapore, 099253
Office Email: singapore@cockett.com

Bunker Enquiries: +65 6732 2225
Facsimile: +65 6732 2272
Fuel Supply Terms & Conditions
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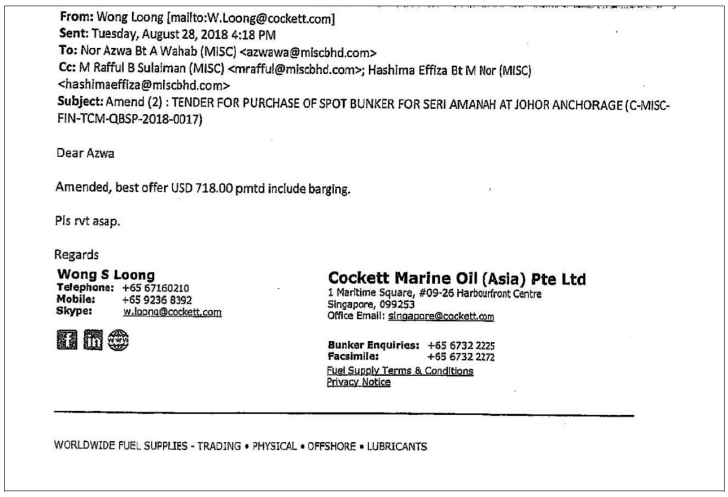
(d) The defendant's email at 1618 hours to state the price of USD718 per metric ton, containing the defendant's hyperlink, also did not refer to the defendant's terms. The entire email is reproduced below:

E



From: Wong Loong [mailto:W.Loong@cockett.com]
Sent: Tuesday, August 28, 2018 4:18 PM
To: Nor Azwa Bt A Wahab (MISC) <azwawa@miscbhd.com>
Cc: M Rafful B Sulaiman (MISC) <mrafful@miscbhd.com>; Hashima Effiza Bt M Nor (MISC) <hashimaeffiza@miscbhd.com>
Subject: Amend (2) : TENDER FOR PURCHASE OF SPOT BUNKER FOR SERI AMANAH AT JOHOR ANCHORAGE (C-MISC-FIN-TCM-QBSP-2018-0017)

F

Dear Azwa

Amended, best offer USD 718.00 pmtd include barging.

Pls rvt asap.

Regards

G

Wong S Loong
Telephone: +65 67160210
Mobile: +65 9236 8392
Skype: w.loong@cockett.com

Cockett Marine Oil (Asia) Pte Ltd
1 Maritime Square, #09-26 Harbourfront Centre
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Facsimile: +65 6732 2272
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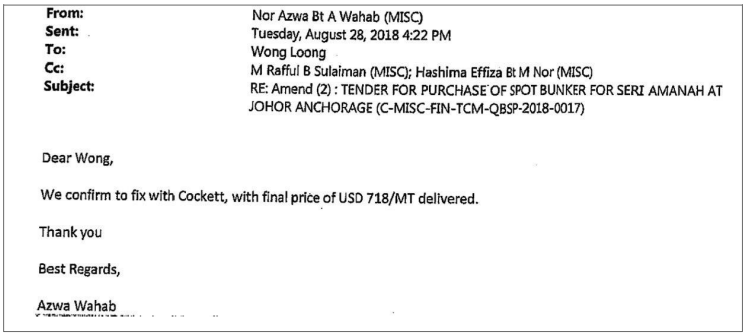
(e) up to 1622 hours on 28 August 2018 only the price to be paid for the bunker was in issue and this was finally agreed by the plaintiff at USD718 per metric ton. The email sent at 1622 hours was an acceptance by the plaintiff and a contract was formed at the point when it was received by the defendant. The entire email is reproduced below:

I



From: Nor Azwa Bt A Wahab (MISC)
Sent: Tuesday, August 28, 2018 4:22 PM
To: Wong Loong
Cc: M Rafful B Sulaiman (MISC); Hashima Effiza Bt M Nor (MISC)
Subject: RE: Amend (2) : TENDER FOR PURCHASE OF SPOT BUNKER FOR SERI AMANAH AT JOHOR ANCHORAGE (C-MISC-FIN-TCM-QBSP-2018-0017)

Dear Wong,

We confirm to fix with Cockett, with final price of USD 718/MT delivered.

Thank you

Best Regards,

Azwa Wahab

(f) the plaintiff then sent an email at 1721 hours on 28 August 2018 relating to operational details of the bunker delivery. This is not a further negotiation of terms as the defendant contended; and

(g) up to the 1622 hours email on 28 August 2018, the defendant did not attempt to incorporate the defendant's Terms into the supply contract.

[44] The supply contract was concluded on 28 August 2018 at 1622 hours on the plaintiff's terms. By then, cl 14.2 of the plaintiff's terms, which is an 'entire agreement' clause which supersedes all prior negotiations, representations or agreements, oral or written was operative. Thus the supply contract was not made after 30 August 2018 and accepted by conduct as submitted by the defendant. The defendant's message in Mr Wong Loong's email of 30 August 2018 which says 'we are now able to confirm having placed the following bunker nomination' acknowledges the concluded contract.

[45] The invitation to tender issued by the plaintiff via email dated 28 August 2018 (0941 hours) was an offer and capable of immediate acceptance. It is not a mere invitation to treat as apart from the specific price made on the forms provided by the plaintiff, which incorporated the plaintiff's tender number, other terms, including time and place of supply, fuel specifications, and terms and conditions therewith, were already present in the invitation to tender and were not left open to further discussion. The only matter outstanding was the price of the fuel to be supplied, which by 1622 hours had been agreed upon. The view stated in *Hui Jia Hao v Perdana Park City Sdn Bhd & Anor* [2012] 8 MLJ 385; [2011] 1 LNS 595 by Hamid Sultan J (as he then was) was that test ought to be 'whether the offer is immediately capable of acceptance'. In my considered view the invitation to tender satisfies the test.

[46] No special attention was drawn to the fact that the defendant would contract on their terms only as there was no specific notice in the body of the emails after receiving the tender document that the defendant is counter proposing that any contract would only be on its terms. In the correspondence

between the parties the defendant never suggested that it was the defendant's Terms that applied to the supply contract.

[47] The hyperlink is not sufficient to incorporate the defendant's terms. There is no step taken by the defendant to draw the attention of the plaintiff's to the application of the hyperlink which only appeared in the foot of the defendant's emails. The defendant's terms did not arise in the body of any email or communication until 30 August 2018.

[48] The defendant did not make it plain that the defendant's Terms are to govern the supply contract by giving reasonable notice of the conditions in a visually prominent way. In *Transformers & Rectifiers Ltd v Needs Ltd* [2015] EWHC 269, it was held by the English High Court that a seller who wishes to incorporate his terms and conditions by referring to the acknowledgment of order must, at the very least, refer to those conditions on the face of the acknowledge of order in terms that make it plain that they are to govern the contract. In this particular case it was held that if the conditions are not in a form that is in common use in the relevant industry, the seller must give the buyer reasonable notice of the conditions by printing them on the reverse of the acknowledgement of order accompanied by a statement on the face of the acknowledgement of order that it is subject to the conditions on the back. See also *Sterling Hydraulics Ltd v Dichtomatic Ltd* [2006] EWHC 2004 where the English High Court held that adequate notice of the terms must be given if they are to prevent the acknowledgment of an offer made on different terms from resulting in binding contract.

[49] Visually, the privacy notice, which is of little consequence in these dealing, has the same prominence as the 'Fuel Supply Terms & Conditions'. A reference to an insconspicuous hyperlink at the bottom of someone's signature at the footer of the email does not constitute sufficient notice of intention to contract on different terms.

[50] The plaintiff as the buyer had already made it plain that its terms and conditions applied and that it gave the plaintiff's terms to the defendant who responded by quoting the price using the tender document proposal form. Conversely, the defendant did not make specific reference to the defendant's Terms in the proposal form or include the terms to make a counter offer.

[51] The defendant's email of 30 August 2018, although it makes reference to the defendant's Terms does not incorporate these terms as contract which was concluded on the plaintiff's terms contains both an 'entire agreement' clause (cl 14.2) and 'no modification' clause (cl 14.5). The plaintiff's accepting delivery of the first parcel of bunkers does not equate to the acceptance of the defendant's terms in writing as the plaintiff's terms has express provisions for

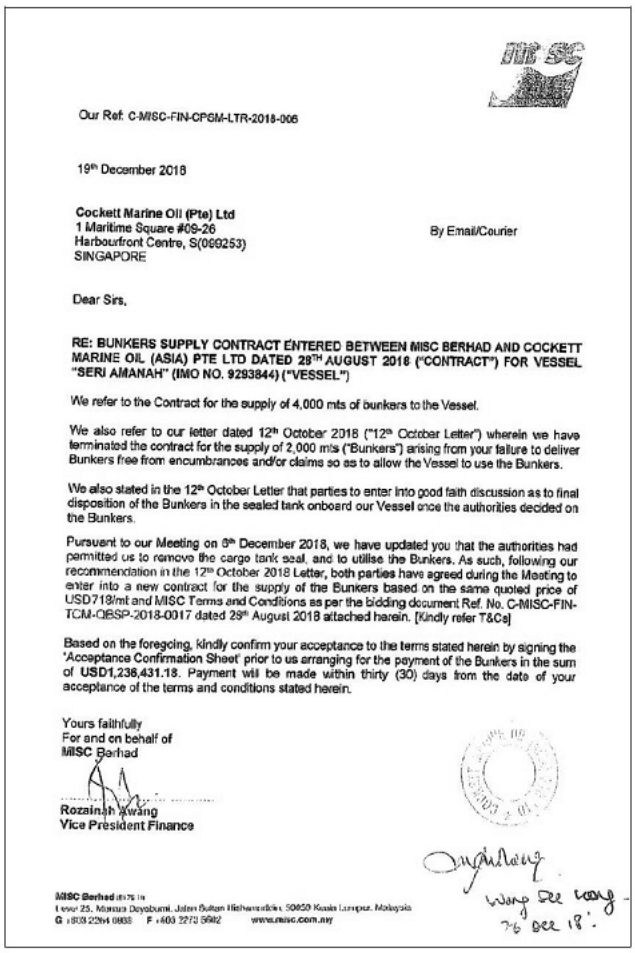
amendments cannot be overridden by conduct (see *Tahan Steel Corporation Sdn bhd v Bank Islam Malaysia Berhad* [2004] 6 MLJ 1; [2004] 3 AMR 43). The defendant did not make it clear that it was seeking to vary the already concluded agreement between the parties by drawing the plaintiff's attention to the same.

[52] The defendant's conduct after the termination of the supply contract demonstrates that the defendant knew and accepted that the supply contract between the parties was on the plaintiff's terms.

[53] It is relevant that the new contract for the purchase of the parcel of bunkers after release was for the same purchase price and on the plaintiff's terms. In the plaintiff's letter to the defendant dated 19 December 2018 after the supply contract for the first parcel was terminated on 12 October 2018 it was stated:

> Pursuant to our Meeting on 6th December 2018, we have updated you that the authorities had permitted us to remove the cargo tank seal, and to utilise the Bunkers. As such, following our recommendation in the 12th October 2018 Letter, both parties have agreed during the Meeting to enter into a new contract for the supply of the Bunkers based; on the same quoted price of USD718/mt and MISC Terms and Conditions as per the bidding document Ref. No. C-MISC-FJN-TC(W-Q6SP-2018-0017 dated 28'' August 2018 attached herein. [Kindly refer T&Cs]

[54] The letter is reproduced as below:



Our Ref: C-MISC-FIN-CPSM-LTR-2018-006

19th December 2018

Cockett Marine Oil (Pte) Ltd
1 Maritime Square #09-26
Harbourfront Centre, S(099253)
SINGAPORE

By Email/Courier

Dear Sirs,

RE: BUNKERS SUPPLY CONTRACT ENTERED BETWEEN MISC BERHAD AND COCKETT MARINE OIL (ASIA) PTE LTD DATED 28TH AUGUST 2018 ("CONTRACT") FOR VESSEL "SERI AMANAH" (IMO NO. 9293844) ("VESSEL")

We refer to the Contract for the supply of 4,000 mts of bunkers to the Vessel.

We also refer to our letter dated 12th October 2018 ("12th October Letter") wherein we have terminated the contract for the supply of 2,000 mts ("Bunkers") arising from your failure to deliver Bunkers free from encumbrances and/or claims so as to allow the Vessel to use the Bunkers.

We also stated in the 12th October Letter that parties to enter into good faith discussion as to final disposition of the Bunkers in the sealed tank onboard our Vessel once the authorities decided on the Bunkers.

Pursuant to our Meeting on 6th December 2018, we have updated you that the authorities had permitted us to remove the cargo tank seal, and to utilise the Bunkers. As such, following our recommendation in the 12th October 2018 Letter, both parties have agreed during the Meeting to enter into a new contract for the supply of the Bunkers based on the same quoted price of USD718/mt and MISC Terms and Conditions as per the bidding document Ref. No. C-MISC-FIN-TCM-OBSP-2018-0017 dated 28th August 2018 attached herein. [Kindly refer T&Cs]

Based on the foregoing, kindly confirm your acceptance to the terms stated herein by signing the 'Acceptance Confirmation Sheet' prior to us arranging for the payment of the Bunkers in the sum of **USD1,238,431.18**. Payment will be made within thirty (30) days from the date of your acceptance of the terms and conditions stated herein.

Yours faithfully
For and on behalf of
MISC Berhad

Rozainah Awang
Vice President Finance

Wong See Kong
26 Dec 18.

MISC Berhad (8075-H)
Level 25, Menara Dayabumi, Jalan Sultan Hishamuddin, 50050 Kuala Lumpur, Malaysia
T +603 2054 0888 F +603 2273 5982 www.misc.com.my

[55] It would be odd for the sale of the same bunkers that flow from the plaintiff's invitation to bid to be transacted on different terms.

[56] The defendant's solicitors' letters of 13 January 2020 and 4 March 2020 refer specifically to the contract concluded on 28 August 2018 on the plaintiff's terms and does not anywhere raise the possibility that the defendant's Terms apply. In fact, in the defendant's letter dated 4 March 2020, the defendant's solicitor also makes reference to cl. 9.1 of the plaintiff's terms. The letters are as below:

A

B

C

D

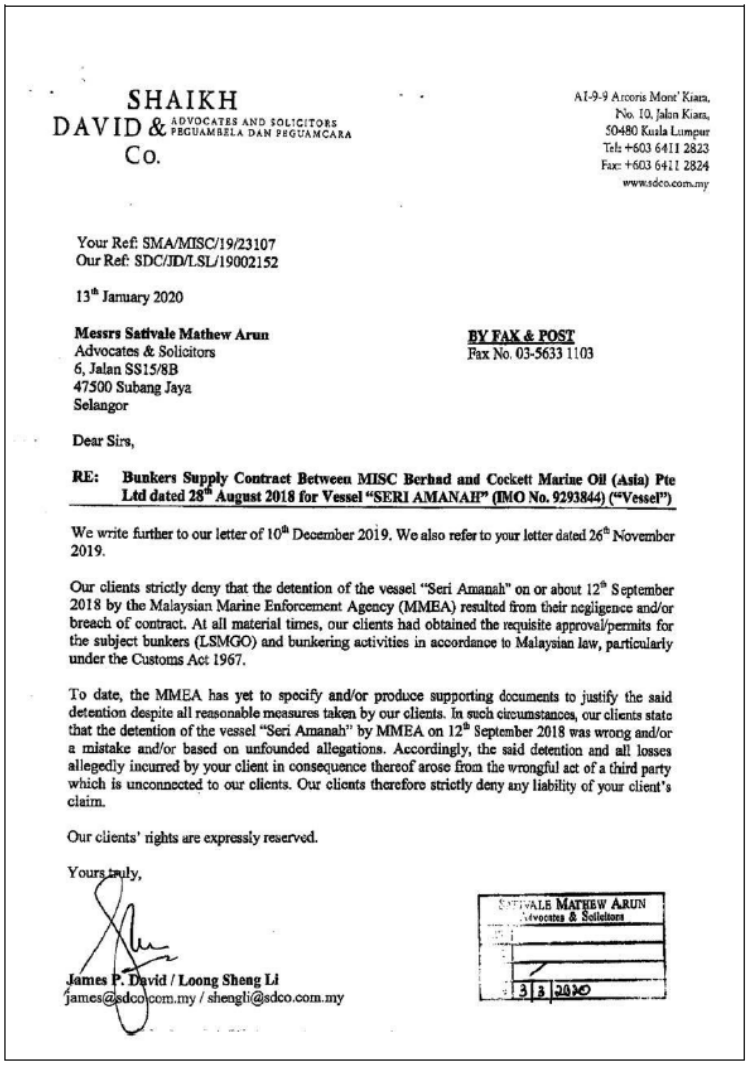
E

F

G

H

I



SHAIKH DAVID & Co.
ADVOCATES AND SOLICITORS
PEGUAMBELA DAN PEGUAMCARA

A1-9-9 Arcoris Mont' Kiara,
No. 10, Jalan Kiara,
50480 Kuala Lumpur
Tel: +603 6411 2823
Fax: +603 6411 2824
www.sdco.com.my

Your Ref: SMA/MISC/19/23107
Our Ref: SDC/JD/LSL/19002152

13th January 2020

Messrs Sativale Mathew Arun
Advocates & Solicitors
6, Jalan SS15/8B
47500 Subang Jaya
Selangor

BY FAX & POST
Fax No. 03-5633 1103

Dear Sirs,

RE: Bunkers Supply Contract Between MISC Berhad and Cockett Marine Oil (Asia) Pte Ltd dated 28th August 2018 for Vessel "SERI AMANAH" (IMO No. 9293844) ("Vessel")

We write further to our letter of 10th December 2019. We also refer to your letter dated 26th November 2019.

Our clients strictly deny that the detention of the vessel "Seri Amanah" on or about 12th September 2018 by the Malaysian Marine Enforcement Agency (MMEA) resulted from their negligence and/or breach of contract. At all material times, our clients had obtained the requisite approval/permits for the subject bunkers (LSMGO) and bunkering activities in accordance to Malaysian law, particularly under the Customs Act 1967.

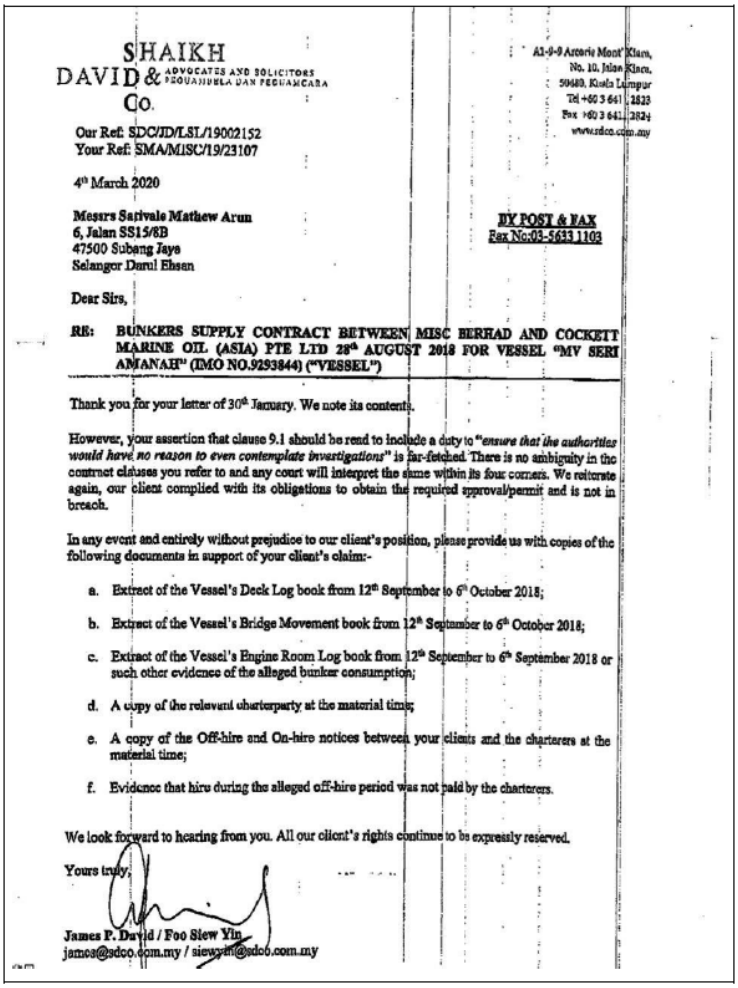
To date, the MMEA has yet to specify and/or produce supporting documents to justify the said detention despite all reasonable measures taken by our clients. In such circumstances, our clients state that the detention of the vessel "Seri Amanah" by MMEA on 12th September 2018 was wrong and/or a mistake and/or based on unfounded allegations. Accordingly, the said detention and all losses allegedly incurred by your client in consequence thereof arose from the wrongful act of a third party which is unconnected to our clients. Our clients therefore strictly deny any liability of your client's claim.

Our clients' rights are expressly reserved.

Yours truly,

James P. David / Loong Sheng Li
james@sdco.com.my / shengli@sdco.com.my

SATIVALE MATHEW ARUN
Advocates & Solicitors
3 3 2020



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www.sdco.com.my

Our Ref: SDC/JD/LSL/19002152
Your Ref: SMA/MISC/19/23107

4th March 2020

Messrs Sarivale Mathew Arun
6, Jalan SS15/8B
47500 Subang Jaya
Selangor Darul Ehsan

BY POST & FAX
Fax No:03-5633 1103

Dear Sirs,

RE: BUNKERS SUPPLY CONTRACT BETWEEN MISC BERHAD AND COCKETT MARINE OIL (ASIA) PTE LTD 28th AUGUST 2018 FOR VESSEL "MV SERI AMANAH" (IMO NO.9293844) ("VESSEL")

Thank you for your letter of 30th January. We note its contents.

However, your assertion that clause 9.1 should be read to include a duty to "*ensure that the authorities would have no reason to even contemplate investigations*" is far-fetched. There is no ambiguity in the contract clauses you refer to and any court will interpret the same within its four corners. We reiterate again, our client complied with its obligations to obtain the required approval/permit and is not in breach.

In any event and entirely without prejudice to our client's position, please provide us with copies of the following documents in support of your client's claim:-

a. Extract of the Vessel's Deck Log book from 12th September to 6th October 2018;

b. Extract of the Vessel's Bridge Movement book from 12th September to 6th October 2018;

c. Extract of the Vessel's Engine Room Log book from 12th September to 6th September 2018 or such other evidence of the alleged bunker consumption;

d. A copy of the relevant charterparty at the material time;

e. A copy of the Off-hire and On-hire notices between your clients and the charterers at the material time;

f. Evidence that hire during the alleged off-hire period was not paid by the charterers.

We look forward to hearing from you. All our client's rights continue to be expressly reserved.

Yours truly,

James P. David / Foo Siew Yin
james@sdco.com.my / siewyin@sdco.com.my

[57] Premised on the above, the defendant have failed to demonstrate the existence of an arbitration agreement between the parties and cannot rely on s 10 of the Arbitration Act 2005 to stay these proceedings.

STEP IN THE PROCEEDINGS

[58] Even if I am wrong in deciding that there was no arbitration agreement between the plaintiff and the defendant, the stay should not be allowed as the defendant has indicated an election to abandon its rights to a stay of proceedings in favour of arbitration by taking a step in proceedings.

[59] The defendant's conduct from the outset did not indicate an intention to arbitrate. At no point during the exchange of correspondence prior to the filing of the suit was the question of arbitration ever canvassed.

[60] The defendant's solicitors in their letter dated 3 July 2020 notified the plaintiff's solicitors that they had instructions to accept service of cause papers 'without prejudice to their client's rights in relation to the issue of jurisdiction'. However the defendant during the case management of 4 August 2020 sought for an extension of time to file their defence with no reference at all to the question of stay and without making reference to this reservation.

[61] Although the defendant's solicitors stated the reservation in their letter of 3 July 2020, it is not conclusive that it was specifically in reference to pursuing a stay of proceedings pending arbitration, given that at this point they have not seen the cause papers and the words 'proper jurisdiction of the dispute' had a broad scope, not expressly referring to reference to arbitration.

[62] The subsequent conduct of the defendant during case management demonstrates that an application for stay to be filed was not being contemplated. The defendant's solicitor makes no reference to the reservation of jurisdiction any longer. The defendant appeared to be more concerned with ensuring that its defence was filed. If the defendant had intended for an application for stay to be filed or it was being contemplated, this could have been indicated to the senior assistant registrar earlier before the extension of time was granted to file.

[63] The defendant's solicitors' request for an extension of time to serve a defence amounts in law to a step in these proceedings and a submission to the jurisdiction of this court. This position in law has been made clear in *Sanwell Corporation v Trans Resources Corporation Sdn Bhd* [2002] 2 MLJ 625; [2002] 3 CLJ 213, *Mung Seng Fook v AIG Insurance Bhd* [2019] 7 MLJ 59 and *Winsin Enterprise Sdn Bhd v Oxford Talent (M) Sdn Bhd* [2009] MLJU 286; [2010] 3 CLJ 634.

[64] It is relevant that the request for directions to file the defence and then the application for an extension of time was made to court and not between solicitors. By doing this is in case management the defendant invoked the jurisdiction of the court to grant them an extension under O 3 r 5(1) and O 34 r 1 of the ROC 2012. In my view an application for extension of time to file defence made in case management is an application to the court which is taking a step in the proceedings as contemplated in *Ford's Hotel Co Ltd v Barlett* and *Ives & Barker v Williams*. This does not need to be a formal application as O 34 r 1 of the ROC 2012 grants the court the power to extend or abridge the period to file the defence in case management.

[65] *Mun Seng Fook v AIG Malaysia Insurance Bhd* is followed. Here an application for an extension of time was made during the case management and this amounted to taking a step in the proceedings. It was held by the High Court (per Noorin Badaruddin J):

> ... the respondent has submitted to the jurisdiction of the court on the first case management date on 18 July 2017 when the respondent did not attend court but requested the appellant's solicitors to mention on their behalf to request for an extension of time to file the statement of defence to 1 August 2017. The respondent's solicitor did not attend personally to inform the court that the respondent is taking out an application for stay or that the respondent is taking out an application for stay or that the request for extension of time to file the statement of defence was on a without prejudice basis.

[66] During case management, it was the defendant's counsel who initiatiated the question of the defence by stating that they wanted two weeks, until 18 2020 to file the defence (email dated 4 August 2020 at 0953 hours). Counsel then went on to explain (email dated 4 August 2020 at 1018 hours) that the due date for defence was 12 August 2020 and could only file the defence only on 18 August 2020 as the defendant was overseas, in effect applying for a six day extension of time to file the defence. This was not prompted by the senior assistant registrar and was an unequivocal election on the defendant's part. The application for extension of time was also made relatively early, eight days before the due date for the defence, without any mention of the intention to apply for stay pending arbitration. *C & B Global Sdn Bhd v Getthiss (M) Sdn Bhd* and *Kinetic Motion Sdn Bhd v Sabah Net Sdn Bhd* relied on by the defendant are distinguished. *Hamidah Fazilah Sdn Bhd v Universiti Tun Husein Onn Malaysia* and *Nam Fatt Corporation Bhd & Anor v Petrodar Operating Co Ltd & Anor* are not applicable in this instance.

[67] In *C & B Global Sdn Bhd v Getthis (M) Sdn Bhd* the defendant had no choice but to file the defence because it was ordered to by the court during case management. They did so and reserved their right to apply for a stay in the defence. There was no such reservation of right expressed by the defendant's solicitor in this instance in case management and in fact the defendant's counsel brought up the question of the defence by stating that they wanted two weeks to file the defence and applied for an extension of time to file the defence without any compulsion.

[68] *Kinetic Motion Sdn Bhd* does not assist the defendant. In that case, the defendant sought a stay against an order that they file their defence pending an appeal to the Court of Appeal. The court refused the stay on the grounds that since it was ordered by the court, it was not a voluntary step on the part of the defendant. There was compulsion here and the filing of the defence after being refused a stay is not a voluntary step unlike in this case.

[69] The cases of *Hamidah Fazilah Sdn Bhd v University Tun Hussein Onn Malaysia* and *Nam Fatt Corporation Bhd & Anor v Petrodar Operating Co Ltd & Anor* are inapplicable as these do not relate to the request for an extension of time to file the defence. Further in these two cases, the respective defendants had ensured that the court was made aware that the steps taken were without prejudice to their challenge to the suit.

INHERENT JURISDICTION

[70] I decline to exercise this court's power to order a stay of this Suit pursuant to s 25 of the Courts of Judicature Act 1964 and O 92 r 4 of the ROC 2012 after finding that the defendant had taken a step in the proceedings. From the affidavit evidence, the defendant has not made out a case of there being multiplicity of proceedings and abuse of process by the plaintiff.

Enclosure 22 — Plaintiff's anti-arbitration injunction

[71] The part of the judgment below only relate to encl 22 which is the plaintiff's application for an anti-arbitration injunction.

THE PLAINTIFF'S SUBMISSIONS

[72] The plaintiff's submissions are summarised as follows:

(a) the question of adequacy of damages and balance of convenience does not arise, since the primary question before this court in both applications (encl 16 and encl 22) is one of this court's jurisdiction, which when answered in the plaintiff's favor would result in the nullity of the defendant's reference to arbitration and affirm the jurisdiction of this court;

(b) there are serious issues to be tried in respect of the plaintiff's claim which is is premised upon recognised and sustainable causes of action founded on the detention of the vessel by the MMEA due to an alleged breach by the defendant under the Customs Act which relate to the payment of taxes for the bunkers, breaching cll 9.1 and 11.1 of the supply contract (on the plaintiff's terms) which place the obligation upon the defendant to ensure the obtaining of licences and permits, compliance with all applicable laws and ensuring that local authorities would have no reason to detain the vessel;

(c) damages are inadequate because the plaintiff would lose the right to litigate in the forum of its choice in the Malaysian courts, as expressed and agreed in the supply contract, which is not quantifiable. Section 114(e) of the Malaysian Evidence Act 1950 (the presumption that judicial and official acts have been regularly performed) will not be

available to the plaintiff should it be compelled to arbitrate, as the rules of evidence do not apply to arbitration;

(d) the balance of convenience or justice lies with the plaintiff as the plaintiff's claim is premised on a contract entered into on the plaintiff's terms, which provide for Malaysian law and Malaysian court jurisdiction; and

(e) the dismissal of both encls 16 and 22 would lead to absurdity as there will be attendant difficulties and consequences if the London arbitration were to be allowed to proceed to its conclusion.

THE DEFENDANT'S SUBMISSIONS

[73] The defendant submitted that this is not a case justifying a grant of an anti-arbitration injunction order. Relying on the Court of Appeal case of *TNB Fuel Services Sdn Bhd v China National Coal Group Corp* [2013] 4 MLJ 857 the defendant argued that when an arbitration agreement is incorporated in the correspondence, the anti-arbitration injunction should not be allowed.

[74] The plaintiff further submitted that the plaintiff had failed to disclose the offer contained in the email of 28 August 2018 at 1500 hours and the plaintiff had therefore failed to comply with the duty of full and frank disclosure in applying for the injunction. The defendant relied on *Leasing Corporation Sdn Bhd v Indah Lestari Sdn Bhd* [2007] 7 MLJ 506.

[75] Finally it was submitted that the plaintiff's claim at its highest is a pure monetary claim which can be adequately compensated by damages. The defendant cited the cases *Perbadanan Setiausaha Kerajaan Selangor v Metroway Sdn Bhd* [2003] 3 MLJ 522 and *Amazing Place Sdn Bhd v Couture Homes Sdn Bhd & Anor* [2011] 7 MLJ 52 to support this submission.

ANALYSIS AND FINDINGS

Serious issues to be tried

[76] I agree with the plaintiff's submissions that there are serious issues to be tried in respect of the plaintiffs claim. The plaintiff's claim is premised upon recognised and sustainable causes of action based on the breach of the defendant's obligation to ensure that the supply of the bunkers that were free from encumbrance. The disputes and differences must be resolved at trial. From the defendant's submissions, no issue was taken by the defendant regarding the question of serious issues to be tried for the purpose of the anti-arbitration injunction.

Damages are an inadequate remedy

[77] Damages will be inadequate for the plaintiff if the plaintiff is prevented from litigating in the forum of its choice, as expressed and agreed in the supply contract. The plaintiff, a Malaysian shipping company, would have to resort to arbitration in a foreign jurisdiction to enforce contractual rights governed by Malaysian law and subject to the jurisdiction of the Malaysian Courts. The plaintiff's anti-arbitration injunction is to prevent an abuse of process by the defendant in forcing the plaintiff who is not a party to an arbitration agreement to arbitrate in London. The loss of forum is therefore not quantifiable.

Balance of convenience/justice

[78] The balance of convenience lies with the plaintiff. The underlying and material disputes and differences between the parties, all the necessary and relevant parties are before this court and within the jurisdiction of this court. This court is best suited to determine this action herein.

[79] If the stay is not allowed but the anti-arbitration injunction is disallowed this will result in the plaintiff's action proceeding in this court and the defendant proceeding with the London arbitration. This absurd scenario must be avoided.

Full and frank disclosure

[80] I find the defendant's argument that the plaintiff failed to comply with the duty of full and frank disclosure in applying for this injunction application as the plaintiff failed to disclose the offer made by the defendant in the email dated 28 August 2018 at 1500 hours to the attention of this court in the plaintiff's Injunction Application to be without merit.

[81] The duty for full and frank disclosure arises only on an ex parte application for injunctive relief as provided in O 29 r 2A of the ROC 2012. See also *APFT Bhd v Dato' Faruk bin Othman* [2018] MLJU 1471; [2018] 1 LNS 1859: when the injunction application is only heard inter parte the requirement of full and frank disclosure is no longer a consideration of the court.

[82] The case of *Leasing Corporation* cited by the defendant is distinguished. The material non-disclosure in that case is one of absolute materiality where the deponent who affirmed the affidavit seeking the injunction, in his position as a corporate advisor, former director and shareholder of the plaintiff applicant had failed to disclose the fact that he was a bankrupt, as his status as a bankrupt would have been likely to have had a determining influence upon the decision of his trustworthiness and the credibility of his evidence in the affidavits he affirmed for and on behalf of the plaintiff.

CONCLUSION

[83] In the result, I dismissed the defendant's application for stay of proceedings pending arbitration in London (encl 16) and allowed the plaintiff's anti-arbitration injunction (encl 22) to restrain the defendant to take further steps in the arbitration proceedings in London. Consequently the defendant is ordered to file defence on or before 21 January 2021. I also ordered costs for the plaintiff of RM10,000 for each application.

Defendant's application for stay of proceedings ('encl 16') dismissed and the plaintiff's application for anti-arbitration injunction ('encl 22') allowed with costs.

Reported by Mohd Kamarul Anwar